FILED
OCT 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-177

In The

Supreme Court of the United States

October Term, 1989

AETNA CASUALTY & SURETY COMPANY,

Petitioner,

v.

CHARLES R. McMASTER, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION

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9 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. Preliminary Statement 1

B. The Louisiana Supreme Court's Decision In This Case does Not Conflict With Any Significant Federal Jurisprudence 2

C. No Important Question of Federal Law That Should Be Settled By This Court is Involved Here 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Bethlehem Steel Co. v. Moore, 335 U.S. 874, 69 S.Ct. 239, 93 L.Ed. 417 (1948) 3

Beverly v. Action Marine Services Inc., 433 So.2d 139 (La. 1983) 2

Calbeck v. Travelers Ins. Co., 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962) 4, 5

Davis v. Department of Labor and Industries, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942) 3, 5

Flowers v. Travelers Insurance Co., 267 F.2d 218 (5th Cir. 1959) 3

Kaiser Co. v. Baskin, 340 U.S. 886, 71 S.Ct. 208, 95 L.Ed. 643 (1950) 3

Landry v. Carlson Mooring Service, 643 F.2d 1080 (5th Cir. 1981) 4

Logan v. Louisiana Dock Co., Inc., 541 So.2d 182 (La. 1989) 2, 4

Noah v. Liberty Mutual Insurance Co., 258 F.2d 220 (5th Cir. 1958) 3

Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, 73 S. Ct. 302, 97 L.Ed. 367 (1953) 4

Southern Pacific Company v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) 5

Sun Ship Inc. v. Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980) 4, 5, 6

OTHER AUTHORITIES

33 U.S.C. 902(3) 5

Gilmore & Black, The Law of Admiralty 422 (1975) 4

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ARGUMENT – REASONS FOR DENYING THE WRIT

A. Preliminary Statement

Neither the validity of a treaty or statute of the United States, nor the validity of any Louisiana statute is drawn into question in this case. Thus the decision whether to grant this Petition for Certiorari to the Supreme Court of Louisiana is determined under the same standard used for granting such petitions when this Court entertained direct appeals. The Petition should be

denied because petitioner has not shown that the Louisiana Supreme Court has either 1) decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals or 2) decided an important question of federal law which should be settled by this Court. U.S. Supreme Court Rule 17.

B. The Louisiana Supreme Court's Decision in this Case Does Not Conflict With Any Significant Federal Jurisprudence

The issue in this worker's compensation action is concurrent jurisdiction under both the LHWCA and the Louisiana Worker's Compensation Act for a claim for benefits by an injured worker. The injury was sustained while the Respondent was cleaning a barge on a navigable waterway. The petitioner contends that the LHWCA has exclusive jurisdiction over the claim for benefits by the Respondent. Ruling on a declinatory exception of lack of subject matter jurisdiction, the district, appellate and supreme courts of Louisiana all held that concurrent jurisdiction was appropriate in this case.

Two recent Louisiana cases mandated the disposition by the state courts below of this case: *Beverly v. Action Marine Services Inc.*, 433 So.2d 139 (La. 1983) (concurrent jurisdiction for a worker injured while cleaning vessel on a navigable waterway); *Logan v. Louisiana Dock Co., Inc.*, 541 So.2d 182 (La. 1989) (concurrent jurisdiction for a worker injured while repairing barges on a dry dock on a navigable waterway).

These two Louisiana cases are in complete accord with a solid line of cases from this Court which cut a broad swath of concurrent jurisdiction between the LHWCA and state worker's compensation acts. The first such case was *Davis v. Department of Labor and Industries*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942) ("twilight zone" of concurrent jurisdiction includes all cases even arguably in the maritime but local sphere). (The "maritime but local" sphere encompasses injuries which occur on navigable waters but which are local in nature, and thus compensable under state law.) Thus the twilight zone of concurrent jurisdiction is larger than zone of maritime but local injuries.

Other cases establishing concurrent jurisdiction in such situations are *Bethlehem Steel Co. v. Moore*, 335 U.S. 874, 69 S.Ct. 239, 93 L.Ed. 417 (1948) (ship repairman injured aboard vessel in dry dock floating in navigable waters; state compensation benefits award affirmed); *Kaiser Co. v. Baskin*, 340 U.S. 886, 71 S.Ct. 208, 95 L.Ed. 643 (1950) (affirming award of state benefits to a ship repairman injured over water). The Respondent was injured while he was cleaning, not repairing, a barge on a navigable waterway. This arguably puts him closer to the "maritime but local" sphere than a ship repairer, making concurrent jurisdiction in this case obvious under *Davis*.

Yet the petitioner has dredged up two cases from the U.S. Court of Appeals for the Fifth Circuit, *Flowers v. Travelers Insurance Co.*, 267 F.2d 218 (5th Cir. 1959); *Noah v. Liberty Mutual Insurance Co.*, 258 F.2d 220 (5th Cir. 1958); and cites these for the proposition that the Respondent here does not fall into the twilight zone of concurrent jurisdiction since he meets the status and situs test of the

LHWCA.[1] These cases do indeed oppose the Respondent's position, and that of the Louisiana courts below.[2] Apparently, however, writs of certiorari were not applied for in them. Subsequent to these two 5th Circuit cases however, this Court validated the twilight zone of concurrent jurisdiction with its opinion in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962), Gilmore & Black, The Law of Admiralty 422 (1975).

The Fifth Circuit now certainly agrees that a worker that meets the criteria of both state law and the LHWCA may file under both, concurrently or successively. See, *Landry v. Carlson Mooring Service*, 643 F.2d 1080 (5th Cir. 1981) (holding election of remedies doctrine inapplicable; the "worker can have his cake and eat it too."). Thus the petitioner does not show any serious conflict between the Louisiana Supreme Court's decisions and those of the 5th Circuit in this regard, and there is no need to grant a writ of certiorari for this reason. Petitioner's citation of *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 73 S. Ct. 302, 97 L.Ed. 367 (1953) is irrelevant. That case dealt with the jurisdictional issue of whether the F.E.L.A. or the LHWCA applied.

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[1] Counsel for petitioner admits that *Logan* case is in accord with *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980), and that he has no quarrel with *Sun Ship*; Pet. 13. Under some confusion however, he states that *Logan* is in conflict with the U.S. Constitution, Pet. 11.

[2] Counsel for petitioner admits that *Logan* case is in accord with *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980), and that he has no quarrel with *Sun Ship*; Pet. 13. Under some confusion however, he states that *Logan* is in conflict with the U.S. Constitution, Pet. 11.

C. No Important Question of Federal Law That Should Be Settled By This Court Is Involved Here

The 1972 Amendments to the LHWCA do not intimate any intent to overrule *Davis* and *Calbeck*. *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 722, 100 S.Ct. 2432, 2437, 65 L.Ed.2d 458 (1980). The law of concurrent jurisdiction is unchanged, and this case works no stress upon it.

Petitioner, however, has asserted that *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) limits the Respondent to the exclusive federal remedy of the LHWCA. He asserts that the nature of Respondent's work, cleaning barges, puts him on the seaward, and federal, side of the *Jensen* line so that state remedies are not available. It may be that *Jensen* still demarcates an exclusive sphere of admiralty jurisdiction and federal remedies for workers injured in a truly maritime area. If this Court should decide it wants to clarify where that line stands, this case is not the one to do it with. There are more traditional maritime operations, and better subjects for exclusive admiralty jurisdiction, than barge cleaning. Examples are provided in the "status" limitation on jurisdiction found in the LHWCA. They are: longshoreman operation, and harbor workers, including ship repairmen, ship builders and ship breakers. 33 U.S.C. 902(3).

The petitioner makes a baseless argument that the very language of 905(a) of the LHWCA (which predates the 9172 amendment) provides the exclusive remedy for any worker meeting the status and situs provisions of the LHWCA. This remarkable position ignores the long line

of Supreme Court cases providing for concurrent jurisdiction between the LHWCA and state compensation acts. Justice Brennan disposed of this argument in a footnote in *Sun Ship*, explaining that 905(a) does not exclude remedies offered by other jurisdictions. *Sun Ship*, 447 U.S. 715, 723, n. 4, 100 S.Ct. 2432, 2438, n. 4.

CONCLUSION

Petitioner has not been able to show a distinct conflict between the decision by the Louisiana Supreme Court below and those of any federal court of appeals. Supreme Court Rule 17.1 (b). Neither has he shown that there is an important question of federal law that must be settled by this Court. Rule 17.1 (c). His Petition for Certiorari should be denied.

Respectfully Submitted

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